Supreme Court, U.S.
FILED

05-35 - JUN 28 2005

OFFICE OF THE CLERK

In The
Supreme Court of the United States
June Term, 2005

MELISSA C. TAYLOR,

Petitioner,

versus

JOHN E. POTTER, Postmaster General,
United States Postal Service,

Respondent,

On Petition For Writ Of Certiorari
The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Melissa Taylor
4415 Northcrest #1612
Midland, TX 79707
(432) 262-6512
June Term 2005

Questions Presented

1. Whether Title 5 Section 8105 is discriminatory against individuals who have suffered a brain or stroke on the job injury because they are initially seen as partially disabled individuals, instead of totally disabled?

2. Whether brain or stroke on the job injured federal employee's who receives a status of partially disabled (they are required to return to work), and treated as equal as the Social Security Disability recipient's who has the same injury but is not force to return to work? Is the treatment the same for individuals who are federal employees and lose the use of both hands or both arms, or both legs, or the sight of both eyes, as compared to the treatment of brain or stroke on the job injured federal employee's?

3. Whether it is reasonable that the United States Department of Labor does not give an employee of the United States Postal Service the opportunity to file for retirement at the time it should have been offered to them?

4. Whether the United States Department of Labor can deny the United States Postal Employee the right to make a change in their Office of Workers Compensation doctor?

5. Whether the United States Department of Labor can change the disability status of an individual several times during the duration of their, permanent, and total disability condition?

6. Whether the United States Department of Labor has the authority to change the medical coverage of an on the job injured federal employee?

Parties Below

Petitioners are Melissa Taylor as the Petitioner

Respondents are John Potter, Postmaster General, United States Postal Service

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No. 04-5114

In The
Supreme Court of the United States
June Term, 2005

MELISSA C. TAYLOR,

Petitioner,

versus

JOHN E. POTTER, Postmaster General,
United States Postal Service,

Respondent,

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Melissa Taylor, respectfully petition for a certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit filed on April 1, 2005 is not reported but reproduced in the Appendix to this Petition at A-1. The Opinion of the district court filed on September 27, 2004 is not reported but is reproduced in the Appendix to this Petition at B-1. The Opinion of the district court filed on September 23, 2004 is not reported but is reproduced in the Appendix to this Petition at C-2.

JURISDICTION

The opinion and judgment of the Fifth Circuit was rendered on April 1, 2005. Pursuant to Supreme Court Rule 13.1 this petition has been filed on June 22, 2005, within ninety days of the denial.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment reads in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

The text of 28 U.S.C. 1291 is set out below. The court of appeal shall have jurisdiction of appeal from all decisions of the courts of the United States, The United States District Court...except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

I. Factual summary

The matter that is before the Court became an issue in October, 1995, when I tried to go on total disability after an on the job accident with the Unites States Postal Service (U.S.P.S.). I found out that I was not seen as totally disabled but seen as partially disabled.

On September 22, 2004 the case was assigned to Judge Robert A. Junell.

Order Motion hearing motion to stay requirement for submitting discovery plan initial disclosure for September 13, 2004, motion to dismiss for lack of subject

matter jurisdiction failure to state a claim, or in the alternative, for summary sign by Judge Robert A. Junell. Motion hearing held for the following motion; motion to dismiss granted.

Final judgment filed on September 23, 2004, dismissed with prejudice. Amended final judgment filed on October 27, 2004, dismissed with prejudice

The United States Court of Appeal upheld the district court dismissal of case and has determining is not subject to judicial review on April 1, 2005 by Reavley, Jolly, Higginbotham, Circuit Judges.

Moreover, the United States Supreme Court has not to my knowledge sought the issues concerning a case like Title 5 Section 8105, and it appears that the Court has never addressed these issues before. This matter is of exceptional importance.

It also concern me of the length time it took this case to get to this point, it has had several delays and cancellations. I found out at a later time I could have filed the case in other courts had there not been so many delays.

II. Basic for federal jurisdiction

The Petitioner has since the beginning asserted that the courts did not give the issue of Title 5 Section 8105 complete re-evaluation. 5 USC 81 Compensation for Workers Injuries Section 8105, Title 5 Section 8105, is not seen as being a fair title for federal employees who has had a brain or stroke on the job injury. This is discrimination against a brain or stroke on the job injury, stating that if you lose both hands, both arms, both legs or both eyes in an on the job injury you would be entitled to better benefits and to total disability at the onset.

Title 5 Section 8105 reads as follows "(a) If the disability is total the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability. (b) The loss of use of both hand, both arms, both legs or the loss of sight of both eyes, is prima facie permanent total disability." 5 USC 81 Compensation for Workers Injuries Section 8105, Title 5 Section 8105, making a difference between federal employee's who has had a brain or stroke on the job injuries and a individual who has lose the use of

both arm, both legs…granting them permanent total disability. There also is a distinct difference in the treatment of federal on the job injured employee's as it is shown here.

REASON FOR GRANTING THE WRIT

As indicated reading the following statements, the decision of the Fifth Circuit determined a vital issue of the federal law that has not been, but should be looked at, and settled by this Court. As stated below, the Fifth Circuit and the district court has not taken into consideration the treatment of federal employee who has had a brain or stroke on the job injured individuals, and how they are discriminated against. If Title 5 Section 8105 is compared to Social Security Disability it shall be noted that there is a difference in the treatment of federal employee's who have had a stroke or brain on the job injury versus a Social Security recipient who has had a stroke or brain injury.

At anytime, anyone has the possibility of a misfortunate incident in which they are left disabled, and in our country there has been some provisions made to assist individuals should such as event occur. Currently,

brain or stroke on the job injuries have been left out of the federal employee's Title 5 Section 8105 and will not initially receive full protection or automatically be seen as totally disabled.

5 USC 81 Compensation for Workers Injuries Section 8105, Title 5 Section 8105, did not entail a provision for a stroke related on the job injury because individuals who has had a stroke have not been associated with an on the job injury claim. Therefore, my case is somewhat unique. I was an individual who the Social Security Administration seen as totally disabled, however, the USDOL would not find me as a totally disabled individual but seen me as a partially disabled individual instead, because of Title 5 Section 8105.

If Title 5 Section 8105 would have found to be totally disabled initially, I would have been declared totally disabled before more than ten years had elapsed. An individual who has suffered a stroke can have their financial needs met by Social Security, however, federal employee's at the U.S.P.S. who has endured an on the job injury like a brain or stroke injury are not initially

protected with the full benefits as a permanent totally disabled individual. Not changing Title 5 Section 8105 to include federal employees that endures a brain or stroke on the job injury excludes such individual from receiving at minimum benefit acknowledged by the Social Security Administrator. Although the federal government recognize Title 5 Section 8105 as law it has not proven to be a just law, as in situations like this.

I. Factual amplification overlooked Title 5 Section 8105

I understand the joint effort of the Fifth Circuit and the district court of appeal but it would help the Court to understand these points. The question presented is of exceptional importance because it is being overlooked by not seeing a federal employee with an on the job brain or stroke injury as disabled, whereas, another branch of the government like Social Security acknowledges the same person as unable to work. This is a discrepancy in our federal system. Social Security found me as totally disabled and Title 5 Section 8105 seen me as partially

disabled and able to work. These reasons are why the decision of the lower courts should be re-evaluated.

A. Compared to Social Security

The lower courts has not offered protection for federal on the job injured individuals by overlooking this matter, in which Social Security recipient's receive better protection than federal employee's who has suffered a brain or stroke on the job injury. As a Social Security recipient I was seen as unable to work and starting receiving benefit in 1991, whereas, it took the USDOL 10 year to make a final determination that I was totally disabled from gainful employment.

The Social Security Administration inquires about:

1. Are you currently working? If so, then you are not ineligible.

2. Do you have a rigorous impairment that considerably limits your working? If so, then you are not ineligible.

3. Does the impairment meet impairments on a detailed SSA list? If so, then you are not ineligible.

4. Can you perform the past related jobs? If so, then you are not ineligible.

5. Can you perform any gainful employment? If so, then you are not ineligible.

If all governmental agencies would define the status of a disabled individual in the same manner there would not be division amongst our federal employee's health policies and discrimination against individuals with disabilities would not occur. The reason I am pursuing this matter is not for profit but for justice. I am interested in fair treatment of all employees, whether disabled nor not, but particularly disabled individuals. The first place that job fairness must take place is in our governmental system. If job equality is performed by our government then other industries can mirror the example set forth by our government.

B. All federal employee's do not have the same coverage

Title 5 Section 8105 does not supply individuals who suffer a on the job brain or stroke injury with the same benefits as other disabled federal individuals who

receives total disability. I am someone who had an on the job stroke injury and has been seen as partially disabled and have to go through periods of time to prove and establish that I am totally disabled. If I were to lose the use of both hands, or both arms, or both sight in both eyes; you will be automatically labeled totally disabled under Title 5 Section 8105. Unfortunately, like in my case I lost the use of part of my brain, which left me unable to use my right arm, hand, foot and part of my leg, and have been declared as partially disabled for over 10 years by the UDSOL.

C. Summary

The goal for all American is to have laws that protect everyone. Unless this matter is carefully considered, a great injustice will continue to burden disabled individuals.

I do not support the decision of Title 5 Section 8105 (i) Title 5 Section 8105 does not acknowledge a brain or stroke on the job injury as totally disabled individual initially (ii) the way Title 5 Section 8105 reads leaves individuals who have brain or stroke injuries that

occur on the job without any protection (iii) changing Title 5 Section 8105 would make things fair for individuals with on the job brain or stroke on the job injury and provides the same coverage as the current benefactors receive (iv) all government agencies needs to say the same things about the disability status of an individual. No federal employee should be left out when it come to job protection.

Therefore I am asking the Fifth Circuit Court findings to be reviewed and these points be reconsidered. This is the first time that I am aware of, that a brain or stroke on the job injury federal employee incident has been brought before this Court and to dismiss this case with out review would do an injustice to disabled federal employees.

The question currently presented is whether Title 5 Section 8105 is discriminatory and violates the rights against brain or stroke on the job injured individuals in the federal government.

II. The issue as they occurred

On July 3, 1990 I suffered a stroke on the job injury and there were no standards for an individual who suffered a debilitating stroke in place for the USDOL and the U.S.P.S. Furthermore, it is not common for this type of on the job injury to occur on the job. Title 5 Section 8105 does not mention brain or stroke on the job injury initially, therefore, leaving me with no other choice but to be labeled as partially disabled instead of totally disabled. Title 5 Section 8105 speaks of the loss or use of both arms, and both hands, or both legs, or loss of the sight in both eyes. The category of losing two of the same body parts is the determining factor if you are labeled as totally disabled initially. Otherwise you would have to provide proof that you were totally disabled which could take years

A. Stroke and the USDOL acceptance of claim

The first doctor I recall seeing was Dr. Cirkovic. He stated that the stroke was caused by excessive environmental heat. In March, 1993 I was requested to see Dr. Sanders in Atlanta, GA by the USDOL. Soon after

that doctor's visit's on April 13, 1993, the USDOL accepted my claim and noted that the injury was job related.

B. Stop working, went on disability seen partially disabled

I received a letter from the USDOL stating I needed to go to my last place of employment to seek work. I was living in San Angelo, TX but moved back to Midland, TX like the letter requested. I started back to work the summer of 1994. I started to have complications spasms, pain in my buttock, and the list goes on. I stopped working in October, 1994. I received a letter dated October 27, 1994 with a job offer from the USDOL stating that I was seen as partially disabled instead of totally disabled. Brain or stroke on the job injuries are not mentioned in the wording of Title 5 Section 8105 so initially an individual is considered partially disabled.

C. Placed on total disability

In March, 1995 I was required to go to a mandated doctor appointment in Abilene, TX by the USDOL. I received a report from that doctor and he

stated I was totally and permanently disabled. The USDOL did not require mandated doctor reports from me for several years.

D. Job offer seen as partially disabled again

Again, in January, 1999 I received a job offer and again in February, 1999 because Dr. van de Water stated that I could work 4 hours or less per day, I was seen as partially disabled at this time.

E. Deny retirement

I have been told several things by different government employees about retiring. There has been several times in which the U.S.P.S. stated that I could retire. In October, 2001 I received a letter stating I have one year to retire. December 9, 2002 I received another letter from the U.S.P.S., which stated that I can not retire because I should have done so in 1994, however, in 1994 the USDOL had seen me as partially disabled (because of the job offer on October 27, 1994). In March, 1995 the USDOL had seen me as totally disabled. They labeled me again as partially disabled in 1999 and finally as totally

disabled in 2001. The U.S.P.S. did not make it clear when I could retire like they could not be clear about my disability status at any given time. The USDOL made it impossible to make a positive determination about when I could retire.

F. SSA, the ADA, Title 5 Section 8105, and right to sue government

The laws for Social Security Administration differ from those in other governmental programs. If a claim like mine is accepted, the recipient will receive financial support; if the illness is permanent they will continue to remain on it for the rest their life, however, sometimes their case may be occasionally reviewed. Social Security laws will allow disabled individuals the ability to work and still receive their benefits. Social Security does not change the status of an individual disability several times over a course of their disabling illness.

The American Disability Act was develop to make life easier for all Disabled Americans who wanted to work and it was intended to make accommodations without discriminating.

When the American Disability Act was made into law in 1992 it did not intend for a disabled individuals, like me, to be tangled in so much red tape to receive justice. The President of the United States of America pass the law with good intentions, but there were some individuals who did not receive justice from the American Disability Act of 1992. As of now, federal employee who suffer a brain or stroke on the job injury are seen as partially disabled and have to prove that they are totally disabled with the help of a competent doctor. When they do come up with a law that better suites federal employees it will be a victory for all brain or stroke on the job injured individuals in the future. In makes a distinct separation between brain or stroke individuals and the provision of what it takes to meets the criteria to receive totally disability at the onset.

It is hard for the Social Security Administration, American Disability Act and the USDOL and Title 5 Section 8105 to agree on who is entitled to receive total disability, and make it impossible for these three entities to agree on who is totally disabled.

G. Inquiry about change of doctors

The Office of Workers' Compensation (OWCP) doctors reports directly to the USDOL. Dr. Van de Water was my OWCP doctor. I wrote the USDOL a letter requesting a different doctor, however, in a reply letter from the government dated October 4, 1994 they would not allow me the right to change doctors, but would give me a one time visit to see another doctor. The USDOL had me to see doctor on a one time visit only, but would not allow me my request to change doctors.

In September, 1998 the USDOL decided to send my Office of Workers Compensation (O.W.C.P) doctor, Dr. Van de Water, a work evaluation form on which she stated that I could work up to 4 hours and because of Dr. Van de Water finding the USDOL took me off of total disabled status and placed me back on partially disabled status. The USDOL sent me job offers after they received Dr. Van de Water doctor's report. (Looking backs, Dr. Van de Water wrote an evaluation about me going back to work when I was still hospitalized for the initially stroke, on July 7, 1990 and August 17, 1990 in her hospital

notes).For these reason that I have stated, I question Dr. Van de Water intentions.

Each doctor that I have seen over the years has informed me that I was totally and permanently disabled, however, the USDOL did not come to the same conclusion. Title 5 Section 8105 did not permit the USDOL to come to the same premise as the medical establishment had previously indicated.

H. Discrepancies

On, December 9, 2002 I received a letter from the U.S.P.S, affirming that I can not retire because I should have done so in 1994 which was impossible because I was found to be partially disabled.

"I am qualify individual with an disability"" because I am seen as totally disabled now, but I have been seen as totally disabled before and they change my disability status to partially disabled, and then back to totally disabled. It seems to only apply that "I am a qualified individual with a disability" whenever the USDOL needs me to be. I have come to the conclusion

that the USDOL can change my disability status whenever they needed to, or when it was pertinent for them to do so.

I. Different medical coverage

A federal on the job injured employee has difference medical coverage when they are no longer on the roll at the U.S.P.S. The primary insurance is Medicare for individuals who are no longer employee with the U.S.P.S. No longer can they go to the doctor of their choice, they must go to only the physician who accept Medicare first. I preferred a specific doctor but could not go to him because he did not take Medicare patients. I also wanted to go to a doctor who could not accept me because he had met his quota of Medicare patients. Also, there are blood procedures which Medicare does not provide to their recipients unless the patient is totally responsible for them. Pap smears are allowed every year by the insurance company I had when I was a U.S.P.S employee, unlike Medicare which allows one every two years. Basically, I have is the same coverage as an individual who is on Social Security and in some cases that person has never worked whereas I have.

It does not seem fair that my health has to be jeopardize because I had a on the job injury as a federal employee and my insurance coverage is now compromised. In some case, individuals who received Social Security have never worked and they have the same coverage as an individual who has worked. It seems as if federal employee are being punish for their on the job disabilities by allowing these measures to continue. To have Medicare as my primary insurance and to adhere to some of there provisions does not seem just.

These are the following reasons why the Courts should grant this Petition for Writ of Certiorari. As set out, the Court should re-evaluate that these are important points and should be determine and settle by this Court.

III. The effects on federal employees

The effect of not reviewing Title 5 Section 8105 will establish different treatment between strokes or brain on the job injuries and other on the job injuries that federal employee's suffer, as well as, Social Security recipients who receive better benefit than stroke or brain individual on the job federal injuries employee's. Social Security

should not have better benefits than on the job injured federal employees. The difference is Social Security brain or stroke injured does not have to work, and the federal on the job injury brain or stroke job injured, does. Whenever Social Security establishes that someone can not work they start paying them benefits, whereas, before the federal government finds a brain or stroke on the job injured individual as totally disabled they have to be evaluated by numerous doctor's just to determine if they are totally disabled. As of now, Social Security gives their recipients better treatment than the working individuals who has had a brain or stroke on the job injury while working for the federal government. Social Security brain and stroke injured benefactors are receiving disability whereas brain or stroke injured federal employee's on the job individuals are not even seen as totally disabled individuals according to Title 5 Section 8105 initially.

IV. The constitutional rights

The constitutional effect that this Court has on the jurisdiction is that the Petitioner is challenging the validity of the right of due process and wants the highest Court to

make a determination on this issue brought before it. This is an example of our government having a law which protects Social Security recipients but not all federal on the job injured employees. The decision to not thoroughly review Title 5 Section 8105 will affect future disabled individuals who have on the job injuries which relates to the brain or stroke.

V. The statutory and constitutional ground for objection

Title 5 Section 8105 is discriminating against brain and stroke job related injured individuals making a distinct difference in the treatment and the benefits they receive. I am asking the Court to review this concern to distinguish if Title 5 Section 8105 denies the rights by allowing specific injuries federal employee's total disability while not giving brain or stroke injured on the job federal employee's the same characterization to begin with.

A. The statutory right to reason

As a Petitioner I am granted the right to the circuit court to appeal the judgment. The lower courts have not

provided to the Petitioner's satisfaction, a systematic review of the issues set forth. I am aware of the caseload, nevertheless, the circuit court have transformed themselves into certiorari courts.

B. The Constitutional right to reason

The Court has not considered Title 5 Section 8105 by due process rights. I am astounded. In order for due process to be establishes in this cases such decision needs to be adhered to by reconsidering that Title 5 Section 8105 needs to be review and taken into consideration that brain or stroke individual are left out of equals rights for all disabled on the job federal employees. The Court failure as of now is the Petitioner's right to due process and the issue of reviewing Title 5 Section 8105, and not overlooking the concerns that are entails.

VI. The federal law that needs to be settled by this Court

The purpose is to influence the Court to review Title 5 Section 8105 and that it has the judicial system to settle this matter. As set out, the Fifth Circuit decided an important question of federal law which should be re-

evaluated, and settle by this Court. Title 5 Section 8105 should see individuals who have a suffered a brain or stroke on the job injury as entitlement to the same treatment and allow them to receive total disability initially as others federal on the job injured employees and not discriminate by making a different between the two. When this happens it could be a great achievement for all federal employees.

These points will help convince the Court to determining that these issues need to be reviewed on whether brain or strokes on the job injured individuals have a voice in Title 5 Section 8105. If the government does nothing to fix this problem it would be a misfortunate situation for the disabled individuals who are employed with the federal government. Disabled federal employee throughout the country can be alleviated by knowing this mishap will never happen again by setting a precedent and changing Title 5 Section 8105 so that all federal employees can receive the same treatment. Let us establish significant road maps so that other can see the

example of our government and the fair treatment of all disabled individuals.

It would be equally plausible to argue that Title 5 Section 8105 represents all disabled individuals, but it doesn't. It is worth noting that Title 5 Section 8105 was established to help disabled individuals, however, it does not. The lack of a review on this matter would bring about arrogance and superiority, whereas, that has not been the position of the courts in this country.

The matter of Title 5 Section 8105 is not going away and I intend to bring it up whenever possible. The issue of brain or stroke on the job injuries concerning federal employee's needs to be serious looks at. This Court should grant review on this issue.

Conclusion

The Petitioner would most graciously ask for a Writ of Certiorari to review the decision of the Fifth Circuit Court.

Respectfully submitted,

Melissa C. Doyle

Melissa Taylor
4415 Northcrest Dr. #1612
Midland, TX 79707

(432) 262-6512 telephone
taymel@msn.com

APPENDIX A

The opinion and judgment of the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

N o. 04-51168
Summary Calendar

MELISSA C. TALOR,

Plaintiff-Appellant

versus

JOHN E POTTER, Postmaster General,
United States Postal Service

Defendant-Appellee

Appeal from the United States District Court for
Western District of Texas
(USDC N7:03-CV-142)

Before REAVLEY, JOLLY, HIGGINBOTHAM, Circuit Judges

PER CURIAM:*

The district court correctly dismissed Taylor's appeal of the Department of Labor's

disability determination because such a determination is not subject to judicial review. 5

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be Published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4

U.S.C. 8128 (b)(2); see Concordia v. U.S.P.S.., 581 F.2d 439, 443 (5th Cir, 1978.

Taylor has failed to show that the Department of Labor violated a clear statutory mandate

And she raises no constitutional claim not suitable for determination in an administrative

setting. See Woodruff v. United States, 954 F. 2d 634, 639 (11th Cir. 1992). Taylor is

also prohibited from alleging disability discrimination in violation of the Rehabilitation

Act in order to secure judicial review of the Department of Labour's determination. See Meester v. Runyon, 149 F.3d 855, 859 (8th Cir. 19998). AFFIRMED

APPENDIX B

The Amended Final Judgment of the United States District Court

B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MELISSA C. TAYLOR
Plaintiff,

v.
MO-03-CV-142

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,
Defendant,

AMENDED FINAL JUDGMENT

On this day, the Court entered an amended Order granting Defendant's Motion to Dismiss for Lack of Subject-matter Jurisdiction and granting Plaintiff's Motion to Make Corrections. The Court now enters its final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Original Complaint is **DISMISSES WITH PREJUDICE AND THE** Parties will bear their own costs.

IT IS FURTHER ORDER that all other pending motions, if any, are **DENIED AS MOOT.**

SIGNED on this ____ day of **OCTOBER, 2004**.

_____

ROBERT JUNELL

Untied States District Judge

Western District of Texas

APPENDIX C

The Final Judgment of the United States District Court

C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MELISSA C. TAYLOR
Plaintiff,

v.
MO-03-CV-142

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,
Defendant,

FINAL JUDGMENT

On this day, the Court entered an Order granting Defendant's Motion to Dismiss for Lack of Subject-matter Jurisdiction. The Court now enters its final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Original Complaint is **DISMISSES WITH PREJUDICE AND THE** Parties will bear their own costs.

IT IS FURTHER ORDER that all other pending motions, if any, are **DENIED AS MOOT.**

SIGNED on this ____ day of **SEPTEMBER, 2004.**

_____

ROBERT JUNELL

Untied States District Judge

Western District of Texas

(2)
Supreme Court, U.S.
FILED
05-35 JUN 6 - 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States
June Term, 2005

MELISSA C. TAYLOR,

Petitioner,

versus

**JOHN E. POTTER, Postmaster General,
United States Postal Service,**

Respondent,

**On Petition For Writ Of Certiorari
The United States Court of Appeals
for the Fifth Circuit**

SUPPLEMENTAL APPENDIX

**Melissa Taylor
4415 Northcrest #1612
Midland, TX 79707
(432) 262-6512**
June Term 2005

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Appendix C –Order granting plaintiff's motion to dismiss for lack of subject-matter jurisdiction filed December 1, 2003Amended Final Judgment of the United States District Court for Western District of Texas filed September 23, 2004.....C-1

APPENDIX A

The opinion and judgment of the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

N o. 04-51168
Summary Calendar

MELISSA C. TALOR,

Plaintiff-Appellant

versus

JOHN E POTTER, Postmaster General,
United States Postal Service

Defendant-Appellee

Appeal from the United States District Court for
Western District of Texas
(USDC N7:03-CV-142)

Before REAVLEY, JOLLY, HIGGINBOTHAM, Circuit Judges

PER CURIAM:*

The district court correctly dismissed Taylor's appeal of the Department of Labor's disability determination because such a determination is not subject to judicial review. 5

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be Published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4

U.S.C. 8128 (b)(2); see Concordia v. U.S.P.S.., 581 F.2d 439, 443 (5th Cir, 1978.Taylor has failed to show that the Department of Labor violated a clear statutory mandate And she raises no constitutional claim not suitable for determination in an administrative setting. See Woodruff v. United States, 954 F. 2d 634, 639 (11th Cir. 1992). Taylor is also prohibited from alleging disability discrimination in violation of the Rehabilitation Act in order to secure judicial review of the Department of Labor's determination. See Meester v. Runyon, 149 F.3d 855, 859 (8th Cir. 19998). AFFIRMED

APPENDIX B

The amended judgment of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MELISSA C. TAYLOR
Plaintiff,

v.
MO-03-CV-142

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,
Defendant,

ORDER GRANTING PLAINTIFF'S MOTION TO MAKE CORRECTIONS AND AMENDED ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION FILED DECEMBER 1, 2003

BEFORE THE COURT are Plaintiff's *pro se* Complaint filed September 22, 2003, Defendant's Motion to dismiss filed December 1, 2003, Plaintiff's *pro se* Response to Defendant's Motion to Dismiss filed December 5, 2003 and Defendant's Reply Brief in Support of motion to Dismiss filed December 23, 2003.

Background

In November, 1996, Plaintiff began working as a City Letter Carrier for the Defendant, United States Postal Service. On July 3, 1990 Plaintiff suffered a stroke while

on-the-job. Subsequently, Plaintiff applied for workers' compensation benefits from the Department of Labor's ("D.O.L") Workers Compensation Programs. On July 20, 1990, the D.O.L. found her to be partially disabled and compensated her accordingly. Plaintiff also sought benefits from the Social Security Administration and it found Plaintiff to be, by contrast, totally disabled which she sees her present status.

Following the stroke, Plaintiff did not work at all for the Defendant for several years and then in October, 1994 she worked a nine-day period in a position that Defendant attempted to create as an alternative, limited-duty position for her. However, the stroke and resulting permanent condition of it, spastic hemiparesis, made it impossible for Plaintiff to perform any job with the Defendant.

Years later, the D.O.L. changed Plaintiff status to permanently and totally disabled. Based on this new determination, the Defendant notified Plaintiff on October 26, 2000 that she was eligible to apply for disability

retirement from the Federal Employees' Retirement System. Plaintiff to date has not applied for the disability retirement.

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1 After reviewing Plaintiff's Motion to make Corrections, filed October 21, 2004, and the record of the case, the Court finds that an incorrect date was inadvertently placed in the first sentence of the background section of this Order. The Court has changed the date from 1996 to 1986, to accurately reflect the actual date that Plaintiff began working for Defendant.

This Court finds it is proper to correct the clerical mistake in the judgment pursuant to Fed. R. Civ. Pro. 60(a), because the mistake l the original order was based on oversight or omission. Further, it should be noted that Plaintiff's Notice of Appeal has been received by this Court and forwarded to the Court of Appeal for the Fifth Circuit, it has not yet been docketed by the Appeals Court.

On July 31, 2001, the Defendant terminated Plaintiff for "being physically unable to perform the full core duties of [her] position." On August 15, 2001, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (E.E.O.C.). On July 25, 2004, the E.E.O.C. issued a Right to Sue Letter after finding that there is in sufficient evidence that Defendant discriminated against Plaintiff due to her disability.

On September 22, 2003, Plaintiff filed the instant suit under Title VII alleging that Defendant terminated her for being disabled. In response, Defendant has filed the instant Motion to Dismiss asking that Plaintiff's claims be dismissed for lack of subject-matter jurisdiction and in the alternative, that Plaintiff's claims be denied as baseless. Specifically, Defendant contends that the Court Lacks Jurisdiction under Title Vii because the Federal Employees Compensation Act ("F.E.C.A."), 5 U.S.C. 8116(a), provides Plaintiff her exclusive remedy. Defendant further contends that Plaintiff's claims under the Title VII's

American's with Disabilities Act and the Rehabilitation Act must fail because she does not qualify as a disabled individual under the Acts.

On September 13, 2004, the Court held a hearing to consider the issues raised in the Motion to Dismiss. At the hearing, Plaintiff's appearing *pro se*, stated on the record that she see herself as totally disabled.

Standard on Motion to Dismiss for Lack of Subject-Matter Jurisdiction

Under Rule 12(b)(1), a court must dismiss a cause for lack of subject matter jurisdiction "when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n v. City of Madison, Miss.*, 143 F.3d1006, 1010 (5th Cir. 1998) (internal quotation marks removed) (quoting *Nowak V. Ironworkers Local 6 Pension Fund*, 81 F3d 1182, 1187 (2d Cir. 1996)). A district court need not resolve unclear question of law in favor of the nonmovant. *See Kansa Reinsurance Co. v. Congressional Mortgage Corp., et al.*, 20 F.3d 1362, 1366(5th Cir. 1994)(citation omitted).

Discussion

The issue presented in this case is whether F.E.C.A. provides the exclusive remedy in this case negating subject-matter jurisdiction under Title Vii and the Rehabilitation Act. F.E.C.A. provides, in relevant part, "[t] h United States shall pay compensation…for the disability or death of an employee resulting from personal injury sustained while in performance of his duty." 5 U.S.C. 8102 (a). F.E.C.A. furnishes the exclusive remedy against the United States for federal employees who sustain damages because of a work-related injury that is within the scope of its coverage. *See* 5 U.S.C. 8116(c) and *Avasthi v. United States,* 608 F. 2d 1059, 1060 (5th Cir. 1979). F.E.C.A. authorizes the Secretary of Labor to grant or deny compensation awards, to modify previous awards, and to grant compensation awards tat were previously denied or discontinued. *See* 5 U.S.C. 8128(a) and 8124. Section 8128 of the Act expressly states:

(a) The Secretary of Labor may review an

award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may-

(1) end, decrease, or increase the compensation previously awarded; or
(2) award compensation previously refused or discontinued.

Section 8128 has been described as a "door-closing provision" because "[t]he Secretary's decision to award or deny compensation to a particular claimant is not subject to judicial review." *See White v United States, 143 F3d 232, 237 (5th Cir 1998).* F.E.C.A. limits the ability of employees to seek legal relief against the government because employees are guaranteed the "Right to receive immediate, fixed, regardless of fault and without need for litigation, but in turn, they lose the right to sue the Government." *Lockheed v. Aircraft Corp. v. United States* 470 U.S. 190, 194 (1983) and *Grijalva v. United States,* 781 F.2d 472, 474 (5th Cir.), *cert denied,* 479 U.S. 882 (1986). The only time that judicial review is not barred by F.E.C.A. is when the plaintiff raises constitutional

questions which are unsuitable for determination in an administrative hearing. *See Woodruff v. U.S. Dept. of Labor, Office of Workers' Compensation Program, 954 F.2d 634, 639 (11th Cir. 1992).*

In the instant case, Plaintiff directly challenges the compensation decisions made under F.E.C.A., though she refers to the as Title VII and Rehabilitation Act claims, which are impermissible collateral attacks of a prior unreviewable decision by the D.O.L. so the are statutorily bared from review. While not all Title Vii and Rehabilitation Act claims filed by federal employees are precluded by F.E.C.A., Plaintiff's claims are precluded because there is no constitutional issue involved. Plaintiff never raised a constitutional challenge in her pleading nor at the hearing. Moreover, Plaintiff doe not make a viable claim under Title V/II or the Rehabilitation Act because she concedes that she can no longer perform the essential functions of her former position as a letter carrier. *See Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 797 (1999)(recognizing that evidence of total

disability is contrary to Title VII ADA claim because a defendant cannot reasonably accommodate someone to perform the essential functions of his job). Furthermore Plaintiff concedes that she is completely disabled so she cannot work in any position for the Defendant-Postal Services. *See McInnis v. Almo Community College Dist.*, 207 F.3d 276, 279 (5th Cir. 2000)(providing four-prong test to establish claim for disability discrimination under the Rehabilitation Act). Therefore, the Court shall grant Defendant's Motion to Dismiss for lack of subject-matter jurisdiction and dismiss Plaintiff's claims with prejudice.

Accordingly, **IT IS HEREBY ORDERED** that defendant's Motion to dismiss for Lack of Subject-Matter Jurisdiction is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Motion to Make Corrections is **GRANTED.**

Signed on this _____day of **OCTOBER, 2004**

ROBERT JUNELL
United States District Judge
Western District of Texas

B-10

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MELISSA C. TAYLOR
Plaintiff,

MO-03-CV-142

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,
Defendant,

AMENED FINAL JUDGMENT

On this day, the Court entered an amended Order granting Defendant's Motion to Dismiss for Lack of Subject-matter Jurisdiction and granting Plaintiff's Motion to Make Corrections. The Court now enters its final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Original Complaint is **DISMISSES WITH PREJUDICE** and the Parties will bear their own costs.

IT IS FURTHER ORDER that all other pending motions, if any, are **DENIED AS MOOT.**

SIGNED on this ____ day of **OCTOBER, 2004**

_____

ROBERT JUNELL

Untied States District Judge
Western District of Texas

APPENDIX C

The Final Judgment of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MELISSA C. TAYLOR
Plaintiff,

v.
MO-03-CV-142

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,
Defendant,

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION FILED DECEMBER 1, 2003

BEFORE THE COURT are Plaintiff's *pro se* Complaint filed September 22, 2003, Defendant's Motion to dismiss filed December 1, 2003, Plaintiff's *pro se* Response to Defendant's Motion to Dismiss filed December 5, 2003 and Defendant's Reply Brief in Support of motion to Dismiss filed December 23, 2003.

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In November, 1996, Plaintiff began working as a City Letter Carrier for the Defendant, United States Postal Service. On July 3, 1990 Plaintiff suffered a stroke while on-the-job. Subsequently, Plaintiff applied for workers'

compensation benefits from the Department of Labor's ("D.O.L") Workers Compensation Programs. On July 20, 1990, the D.O.L. found her to be partially disabled and compensated her accordingly. Plaintiff also sought benefits from the Social Security Administration and it found Plaintiff to be, by contrast, totally disabled which she sees her present status.

Following the stroke, Plaintiff did not work at all for the Defendant for several years and then in October, 1994 she worked a nine-day period in a position that Defendant attempted to create as an alternative, limited-duty position for her. However, the stroke and resulting permanent condition of it, spastic hemiparesis, made it impossible for Plaintiff to perform any job with the Defendant.

Years later, the D.O.L. changed Plaintiff status to permanently and totally disabled. Based on this new determination, the Defendant notified Plaintiff on October 26, 2000 that she was eligible to apply for disability retirement from the Federal Employees' Retirement

System. Plaintiff to date has not applied for the disability retirement.

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On September 22, 2003, Plaintiff filed the instant suit under Title VII alleging that Defendant terminated her for being disabled. In response, Defendant has filed the instant Motion to Dismiss asking that Plaintiff's claims be dismissed for lack of subject-matter jurisdiction and in the alternative, that Plaintiff's claims be denied as baseless. Specifically, Defendant contends that the Court Lacks Jurisdiction under Title Vii because the Federal Employees Compensation Act ("F.E.C.A."), 5 U.S.C. 8116(a),

provides Plaintiff her exclusive remedy. Defendant further contends that Plaintiff's claims under the Title VII's American's with Disabilities Act and the Rehabilitation Act must fail because she does not qualify as a disabled individual under the Acts.

On September 13, 2004, the Court held a hearing to consider the issues raised in the Motion to Dismiss. At the hearing, Plaintiff's appearing *pro se*, stated on the record that she see herself as totally disabled.

Standard on Motion to Dismiss for Lack of Subject-Matter Jurisdiction

Under Rule 12(b)(1), a court must dismiss a cause for lack of subject matter jurisdiction "when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n v. City of Madison, Miss.*, 143 F.3d1006, 1010 (5th Cir. 1998) (internal quotation marks removed) (quoting *Nowak V. Ironworkers Local 6 Pension Fund*, 81 F3d 1182, 1187 (2d Cir. 1996)). A district court need not resolve unclear question of law in favor of the nonmovant. *See Kansa Reinsurance Co. v. Congressional*

Mortgage Corp., et al., 20 F.3d 1362, 1366(5th Cir. 1994)(citation omitted).

Discussion

The issue presented in this case is whether F.E.C.A. provides the exclusive remedy in this case negating subject-matter jurisdiction under Title Vii and the Rehabilitation Act. F.E.C.A. provides, in relevant part, "[t] h United States shall pay compensation…for the disability or death of an employee resulting from personal injury sustained while in performance of his duty." 5 U.S.C. 8102 (a). F.E.C.A. furnishes the exclusive remedy against the United States for federal employees who sustain damages because of a work-related injury that is within the scope of its coverage. *See* 5 U.S.C. 8116(c) and *Avasthi v. United States*, 608 F. 2d 1059, 1060 (5th Cir. 1979). F.E.C.A. authorizes the Secretary of Labor to grant or deny compensation awards, to modify previous awards, and to grant compensation awards tat were previously denied or discontinued. *See* 5 U.S.C. 8128(a) and 8124. Section 8128 of the Act expressly states:

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may-

(1) end, decrease, or increase the compensation previously awarded; or
(2) award compensation previously refused or discontinued.

Section 8128 has been described as a "door-closing provision" because "[t]he Secretary's decision to award or deny compensation to a particular claimant is not subject to judicial review." *See White v United States, 143 F3d 232, 237 (5th Cir 1998).* F.E.C.A. limits the ability of employees to seek legal relief against the government because employees are guaranteed the "Right to receive immediate, fixed, regardless of fault and without need for litigation, but in turn, they lose the right to sue the Government." *Lockheed v. Aircraft Corp. v. United States* 470 U.S. 190, 194 (1983) and *Grijalva v. United States,* 781 F.2d 472, 474 (5th Cir.), *cert denied,* 479 U.S. 882 (1986). The only time that judicial review is not barred by F.E.C.A. is when the plaintiff raises constitutional

questions which are unsuitable for determination in an administrative hearing. *See Woodruff v. U.S. Dept. of Labor, Office of Workers' Compensation Program, 954 F.2d 634, 639 (11th Cir. 1992).*

In the instant case, Plaintiff directly challenges the compensation decisions made under F.E.C.A., though she refers to the as Title VII and Rehabilitation Act claims, which are impermissible collateral attacks of a prior unreviewable decision by the D.O.L. so the are statutorily bared from review. While not all Title Vii and Rehabilitation Act claims filed by federal employees are precluded by F.E.C.A., Plaintiff's claims are precluded because there is no constitutional issue involved. Plaintiff never raised a constitutional challenge in her pleading nor at the hearing. Moreover, Plaintiff doe not make a viable claim under Title V/II or the Rehabilitation Act because she concedes that she can no longer perform the essential functions of her former position as a letter carrier. *See Cleveland v. Policy Management Systems Corp.,* 526 U.S. 795 797 (1999)(recognizing that evidence of total

disability is contrary to Title VII ADA claim because a defendant cannot reasonably accommodate someone to perform the essential functions of his job). Furthermore Plaintiff concedes that she is completely disabled so she cannot work in any position for the Defendant-Postal Services. *See McInnis v. Almo Community College Dist.*, 207 F.3d 276, 279 (5th Cir. 2000)(providing four-prong test to establish claim for disability discrimination under the Rehabilitation Act). Therefore, the Court shall grant Defendant's Motion to Dismiss for lack of subject-matter jurisdiction and dismiss Plaintiff's claims with prejudice.

Accordingly, **IT IS HEREBY ORDERED** that defendant's Motion to dismiss for Lack of Subject-Matter Jurisdiction is **GRANTED.**

Signed on this _____day of **September, 2004**

ROBERT JUNELL
United States District Judge
Western District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MELISSA C. TAYLOR
Plaintiff,

v.
MO-03-CV-142

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,
Defendant,

FINAL JUDGMENT

On this day, the Court entered an Order granting Defendant's Motion to Dismiss for Lack of Subject-matter Jurisdiction. The Court now enters its final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Original Complaint is **DISMISSES WITH PREJUDICE** and the Parties will bear their own costs.

IT IS FURTHER ORDER that all other pending

motions, if any, are **DENIED AS MOOT.**

SIGNED on this ____ day of **SEPTEMER, 2004**

_____

ROBERT JUNELL
Untied States District Judge
Western District of Texas

No. 05-35

In The

Supreme Court of the United States

MELISSA C. TAYLOR,

Petitioner,

versus

JOHN E. POTTER, Postmaster General,
United States Postal Service,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR REHEARING ON BEHALF OF THE UNITED STATES FEDERAL EMPLOYEES

MELISSA TAYLOR
4415 Northcrest Dr., #1612
Midland, TX 79707
(432) 262-6512

October 19, 2005

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PETITION FOR REHEARING ON BEHALF OF THE UNITED STATES FEDERAL EMPLOYEES

In having an opposing opinion to the Court's October 3, 2005, ruling in this case, the Court has not put into consideration that there has been a difference in the treatment with federal employees when it comes to disabilities. Unprecedented perplexity and turmoil in the Court's decision is not clear on what makes an individual totally disabled. It should be noted that a brain or stroke related on-the-job injury is not emphasized in 5 USC 81 Compensation for Workers Injuries Section 81 (Title 5, Section 8105); consequently, not allowing these individuals the same benefits as other federal employees receive,[1] there is a discrete variation in the treatment of federal on-the-job injured employees as it is shown in Title 5, Section 8105.

This is a case suggesting that the government has treated individuals that work for the United States of America in a bias manner. This oversight to exclude brain and stroke on-the-job individuals will set the basic qualities that constitute what is just and correct only because they have been determined on the offset of Title 5, Section 8105 as totally disabled. The uncertainty surrounding the correct protocol for what it takes to determine if an individual is totally disabled needs to be established for all citizens inclusively. In determining the status of an individual the Court should set an accurate standard with

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[1] (a) If the disability is total the United States shall pay the employee during the disability monthly monetary compensation equal to 66⅔ percent of his monthly income, which is known as his basic compensation for total disability. (b) The loss of use of both hands, both arms, both legs or the loss of sight of both eyes, is prima facie permanent total disability.

equal uniformity is allowed to protect each and everyone, something which Title 5, Section 8105 does not do.

The Social Security Administration has not made a distinction in its verdict on establishing that I am totally disabled; however, the United States Department of Labor (USDOL) and the United States Postal Service (USPS) has made several discrepancies with the unreliability of Title 5, Section 8105. The USDOL and the USPS did not make note that I was totally disabled until 2001 and I had the job injury in 1990. The overlooking of this matter by the Court has left me to look at the treatment of on-the-job disabled injured individuals in the federal government. Failure to see the crucial aspect of brain and stroke related on-the-job injuries is setting a vital precedence and is a mishap in our governmental system and should be addressed.

In addition to the serious concerns for the treatment of federal employees with on-the-job injury they are not benefiting as other recipients who have received better benefits from other social government programs. It is apparent that the Court opinion will make a clear statement with the on-the-job individuals of the federal system by overhauling Title 5, Section 8105.

Finally, the October 3, 2005, decision should be evaluated and after looking at these additional points there will with out a doubt be an impact which will stabilize the instability of the current status for disabled individuals who have suffered an on-the-job brain or stroke injury in the federal government.

I. The Evidence That Title 5, Section 8105 Has Denied Brain And Stroke Injured Individuals Initial Total Disability Status And The Difference In Federal Employees Benefits And Social Security Benefits.

The federal employees' benefits under Title 5, Section 8105 do not supply individuals who suffer a brain or stroke on-the-job injury with the same protection as the current benefactors receive. Therefore, the same coverage is not given to every individual who is employed by the USPS. Under the present policy it does not allow an individual with a brain or stroke on-the-job injury to receive total disability at the start, and Title 5, Section 8105 prohibits that from occurring. The current policy does not allow these individuals the same protection at the onset of an injury because they have been left out as federal employees so they do not receive full protection.

Title 5, Section 8105 does not permit brain and stroke individuals the same privileges and coverage as it does to the totally disabled individuals. Title 5, Section 8105 excludes privileges as well as immunity from federal employees who are hurt on-the-job; consequently, making an underlying distinction between brain and stroke on-the-job injured individuals and the totally disabled individuals initially.

Social Security sees me as totally disabled and I started receiving benefits; whereas, the USDOL saw me as partially disabled instead. If Title 5, Section 8105 would have found me as totally disabled initially, I would not have had to go through ten years of red tape. Not changing Title 5, Section 8105 to include brain or stroke on-the-job

injuries could prohibit individuals from receiving minimum benefits that Social Security is giving to their recipients. Social Security recipients receive a far superior protection than the federal employees who suffer a brain or stroke on-the-job injury.

Comparing Social Security Disability (SSD) to Title 5, Section 8105, the differences are very translucent when they are put side by side. The Social Security Administration (SSA) differs from the United States Department of Labor (USDOL) and every other governmental programs. Social Security benefits allow their recipients to work and continue to receive benefits and keep the status as totally disabled as well. Social Security should not have better benefits than the on-the-job injured federal employees. The USDOL, because of Title 5, Section 8105, will not allow their recipients the privilege of working and still have the status of being totally disabled. If you were to go back to work, you are considered partially disabled under Title 5, Section 8105. If all government agencies would characterize the status of a disabled individual in the same manner there would not be separation in our federal health policies. If the different federal branches of government could agree on who is entitled to receive the total disability status then our different entities could agree on who is totally disabled and who is considered partially disabled.

National Association of Letter Carriers (NALC) was the insurance I had when I was still employed at the USPS, and it allowed me to see any doctor anywhere. After I was released from the USPS I was placed on Medicare as my primary and NALC became my secondary. Medicare is a benefit which Social Security recipients are offered. Medicare isn't accepted by all doctors.

It has been brought to my attention in September, 2005 by my doctor's technician that I have a leaky heart valve. The USDOL had required that I see a heart doctor in a letter in 1998, but I question their motives as to why would I need to see a heart doctor. The USDOL later withdrew the request. There have been several heart doctors I have seen since the USDOL suggested that I see one and the heart valve condition went undetected. Even though all the doctors that I had seen earlier did not detect this condition, I am still facing these new findings. There are letters in my possession releasing me from these doctors saying they could not detect a heart condition at that time. Now that my insurance has changed I feel that my life could be in jeopardy, because all doctors do not accept Medicare.

No one asks for an on-the-job injury, but to lose the freedom to go to any doctor and have your insurance coverage change, is unjust. I was injured on the job and they should not be allowed to place me on the insurance of their choice, and that's what happened when I was placed on Medicare.

II. Federal Employees With On-The-Job Brain Or Stroke Injuries Are Being Discriminated In The Work Place By Title 5, Section 8105.

The treatment of federal employee are incapable of being avoided by this Court and will soon have to confront the issue of the unfair handling of on-the-job injured employees who have brain and stroke related injuries. The matter before this Court became an issue in October, 1995. The USDOL informed me that I was seen as a partially disabled employee instead of a totally disabled employee.

Now the Courts will be obliged to resolve and address the question whether uncategorized distinctions in Title 5, Section 8105 are discriminating against brain and stroke individuals as we have seen here by the federal government.

I have gone from partially disabled in October, 1994, to totally disabled, back to partially in January, 1999 to totally in 2001, and now I cannot retire because there has been a mixup in that too. All these things would not have occurred if there was a clause in Title 5, Section 8105 which included brain and stroke on-the-job injuries. There is not just treatment in changing my disability status several times over the years. In the matter of two people who work at the same place with on-the-job injuries, the first one received total disability for his injuries. The second one had a stroke on-the-job injury and lost the use of one arm, the use of one leg, and had a brain injury as well and ends up being considered partially disabled. I am that second person.

There are several questions that need to be answered as to why all federal employees are not receiving the full protection of Title 5, Section 8105. Currently, Title 5, Section 8105 is not providing full means to shield all on-the-job injured. I am asking the Court at the federal level of our government to rehear the case and try to gain understanding and skillfully apply what has been mastered by this petition. The court in its obligation to consider all points of view should fully consider the interest of all federal employees and not just the able bodied.

There should not be a distinct difference with federal employees and we have been shown that Title 5, Section 8105 makes a distinctive diversity with its employees.

Also, it will make a difference in how federal on-the-job injured employees are treated compared to Social Security recipients in the future.

The Court should represent the interest of all parties involved including the federal employees with brain or stroke on-the-job injuries; however, Title 5, Section 8105 especially omits these individuals. Indeed, our legislatures could have an opportunity to adopt a revised policy other than Title 5, Section 8105 for federal employees, who are hurt on the job, making everyone equal. If the Courts change their rulings and revise Title 5, Section 8105, it would lead to a reasonable and beneficial ruling for federal employees.

With the Court being a part of the federal government lets not ignore that these are federal employees and let us show that when something has been brought to the Court's attention that is unjust, we seize the opportunity to fix it.

III. The Courts Now Say I Am "A Qualified Individual With A Disability"; However, I Can Still Speak Of Title 5, Section 8105 As A Citizen On How It Discriminates Against Current Federal Employees.

The lower Court said, "I am a qualified individual with a disability" because I am now seen as totally disabled individual. The Courts have neglected to see me as a citizen who finds a flaw in our governmental laws and legally take that action to alleviate the suffering it causes. Therefore, the Court is asked to respectfully rehear the case not as "a qualified individual with a disability" but an individual who is concerned for all federal employees.

It is noted that the status has been changed on the disability of the Petitioner several times; therefore, changing the "qualification" status as well. The Court should look at the case all over again and then make the decisions that will amend Title 5, Section 8105.

CONCLUSION

There are three things that the Court has not considered before its October 3, 2005 decision: First, the evidence of discriminating against federal employee at this stage has not been considered and the Court's opinion will determine how they are treated in the future. Second, the comparison of federal on-the-job injured employees and their treatment, to similar programs in the government and their benefactor's. Third, I am not speaking as a federal employee only, but I am speaking as a citizen who would like to see changes in Title 5, Section 8105.

These are the reasons why all federal employees who could be affected by Title 5, Section 8105 should be granted a rehearing by the Court.

Respectfully submitted,

MELISSA TAYLOR
4415 Northcrest Dr., #1612
Midland, TX 79707
(432) 262-6512

RULE 44.1 CERTIFICATE

Undersigned Petitioner hereby certifies that the foregoing Petition for Rehearing in *Taylor v. Potter*, No. 05-35, is presented in good faith and not for delay.

MELISSA TAYLOR